IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WATERLOO DIVISION

MARIA WORTHAM, Plaintiff, vs. AMERICAN FAMILY INSURANCE COMPANY, DAVE VORE, and BOB CARNINE, Defendants.	No. C01-2067 **MEMORANDUM OPINION AND ORDER REGARDING DEFENDANTS' MOTION TO DISMISS**

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I. INTRODUCTION

This matter is before the court on the defendants' (hereinafter referred to jointly as "American Family") Motion To Dismiss, filed March 28, 2002. (Doc. No. 6). In this motion, brought pursuant to Federal Rules of Civil Procedure 12(b)(4), 12(b)(5), and

12(b)(6), the defendants seek the dismissal of the plaintiff's employment discrimination action against them and argue: (1) the complaint should be dismissed because the plaintiff did not serve the defendants within the 120 days prescribed by Federal Rule of Civil Procedure 4(m); (2) defendant Bob Carnine should be dismissed because he still has not been properly served; and (3) if the complaint is not dismissed in its entirety, any Title VII and ADEA claims against defendants Bob Carnine and Dave Vore should be dismissed because there is no individual liability under those statutes.

The plaintiff, Maria Wortham, plainly admits that she did not serve defendants within the 120 day time limit, which expired on February 19, 2002. However, she moved for an extension of time to obtain service on the defendants on March 8, 2002. (Doc. No. 3). Chief Magistrate Judge John A. Jarvey granted this motion and extended the time until March 15, 2002. (Doc. No. 4). Wortham executed service on Vore and Carnine on March 8, 2002 and on American Family on March 11, 2002. Furthermore, the plaintiff asserts that, although technically deficient, she was in substantial compliance in serving a summons and petition on Carnine and, therefore, argues that the court should not dismiss him from this litigation. She believes that, if the summons served on Carnine was deficient, the proper remedy is to allow her to amend the summons. And finally, Wortham contends that, at this stage in the litigation, it is too early to determine whether Carnine and Vore are proper individual defendants under Title VII and the ADEA.

II. DISCUSSION

A. Untimely Service Of Process

"A district court has the power to dismiss a case for failure to comply with its rules." *Marshall v. Warwick*, 155 F.3d 1027, 1030 (8th Cir. 1998) (citing *Moore v. St. Louis Music Supply Co.*, 539 F.2d 1191, 1193 (8th Cir. 1976) (dismissal for failure to prosecute)). Moreover, a court's decision whether or not to dismiss is discretionary, rather

than mandatory. *See Adams v. AlliedSignal Gen. Aviation Avionics*, 74 F.3d 882, 886 (8th Cir. 1996). The Rule, furthermore, gives the district court discretion to grant an extension, even in the absence of good cause. *See Panaras v. Liquid Carbonic Ind. Corp.*, 94 F.3d 338, 340 (7th Cir. 1996); *AlliedSignal*, 74 F.3d at 886; *Espinoza v. United States*, 52 F.3d 838, 841 (10th Cir. 1995); *Petrucelli v. Bohringer & Ratzinger GMBH*, 46 F.3d 1298, 1306 (3d Cir. 1995); *cf. Henderson v. United States*, 517 U.S. 654, 662-63 (1996) (stating in dicta, "Most recently, in 1993 amendments to the Rules, courts have been accorded discretion to enlarge the 120-day period even if there is no good cause shown."). Rule 4(m) specifically provides that the court shall allow additional time if there is good cause for the plaintiff's failure to effect service within the prescribed time period. More specifically, Federal Rule of Civil Procedure 4(m) provides that if the summons and complaint are not served upon a defendant within 120 days after the filing of the complaint, the court "shall dismiss the action without prejudice . . . *or direct that service be effected within a specified time*; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period." FED. R. CIV. P. 4(m) (emphasis added).

In this case, the court granted an extension of time past the prescribed 120 day period, and the plaintiff effectuated service of process within that extended time period. The defendants did not move this court to reconsider Chief Magistrate Judge Jarvey's ruling, presumably because the order granting an extension was filed prior to the time process was effectuated on the defendants, and, thus, they were likely unaware of the extension. Because defendants moved solely on the ground that service was untimely and not on the ground that Judge Jarvey erred in granting an extension, this court will defer to Judge Jarvey's ruling and deny without prejudice the defendants' motion to the extent it is premised on insufficiency of service pursuant to Rule 12(b)(4).

B. Insufficiency Of Service Of Process On Carnine

Defendants also contend that Carnine should be dismissed from this action pursuant to Rule 12(b)(5) because he was not properly served. Federal Rule of Civil Procedure 4(a) states that a summons "shall . . . be directed to the defendant." The summons served on Carnine on March 8, 2002 was directed to American Family Insurance, not Carnine. However, the plaintiff argues that she was in substantial compliance with Rule 4(a) because Carnine is clearly identified as a defendant in the caption of the summons and the complaint, which were both served on Carnine. In short, Wortham asserts that, because Carnine was on notice, he was not prejudiced by the technical deficiency in service of process and, therefore, this defect does not justify dismissal.

"Technical defects contained within a summons do not justify dismissal unless a party is able to demonstrate actual prejudice." *FDIC v. Swager,* 773 F. Supp. 1244, 1249 (D. Minn. 1991) (citing *Crane v. Battelle*, 127 F.R.D. 174, 177 (S.D. Cal. 1989); *Minnesota Mining & Mfg. Co. v. Kirkevold,* 87 F.R.D. 317, 323 (D. Minn. 1980)); *accord Libertad v. Welch*, 53 F.3d 428, 440-41 (1st Cir. 1995) (ruling that trial court improperly dismissed action against two groups on ground of minor, technical defect in summons, *i.e.*, summons's failure to state name of person served; those groups had fair notice of suit at all times during proceedings, they had adequate opportunity to protect their interests, and their counsel made general appearances at every stage of proceeding and had ample opportunity to defend against claims); *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994) (holding technical defects in summons do not justify dismissal unless party is able to demonstrate actual prejudice); *Zankel v. United States*, 921 F.2d 432, 436 (2d Cir. 1990) (holding that service of process rule "should not be construed so narrowly or rigidly as to prevent relief from dismissal in every case in which a plaintiff's method of service suffers from a 'technical defect'") (citing *Borzeka v. Heckler*, 739 F.2d 444, 447 (9th Cir. 1984); *Jordan v. United States*, 694 F.2d 833, 836 (D.C. Cir. 1982) (per curiam)). The Court of

Appeals for the First Circuit has explained the significance of notice in the context of technical deficiencies of a summons as follows:

> "[T]he root purpose underlying service of process is to ensure that a defendant receives fair notice of the suit and adequate opportunity to protect her interests." *Jardines Bacata, Ltd. v. Díaz-Márquez*, 878 F.2d 1555, 1559 (1st Cir. 1989). When an alleged defect in service is due to a minor, technical error, only actual prejudice to the defendant or evidence of a flagrant disregard of the requirements of the rules justifies dismissal. 4A C. WRIGHT AND A. MILLER, FEDERAL PRACTICE & PROCEDURE, Civ.2d § 1088; *Benjamin v. Grosnick*, 999 F.2d 590, 594 (1st Cir. 1993) (dismissal for defective service not required where defect in service did not prejudice defendant); *see also, Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984) (dismissal for defective service should be granted only when defendant was prejudiced); *United Food & Comm'l Workers Union Int'l v. Alpha Beta Co.*, 736 F.2d 1371, 1382 (9th Cir. 1984) (dismissal is generally not justified absent a showing of prejudice, and defendant's answer and general appearance in action should prevent any technical error from invalidating entire process).

Libertad, 53 F.3d at 440.

Because the court is satisfied that Carnine was on notice based on the captions of both the summons and the complaint and because the court cannot fathom that he suffered any prejudice,[1] dismissal would be an inappropriate remedy in this case. Instead, the court

[1]Notably, defendants did not assert that Carnine suffered any prejudice from the defective service of process. A showing of prejudice "involves impairment of defendant's ability to defend on the merits, rather than merely foregoing procedural or technical advantage." *National Union Fire Ins. Co. v. Barney Assocs.*, 130 F.R.D. 291, 294 (S.D.N.Y. 1990) (citations omitted). Here, defendants made no attempt to demonstrate prejudice, nor did they present any evidence that Carnine did not receive notice of the action. The sole argument urged by the defendants is that, because the summons was not directed to Carnine, he should be dismissed.

will grant the plaintiff leave to amend and correct the summons.

C. 12(b)(6) Motion As To Title VII And ADEA Claims Against Individual Defendants

The defendants also argue that, even if the court does not dismiss the entire action under 12(b)(4) and 12(b)(5), plaintiff's claims under Title VII and the Age Discrimination in Employment Act ("ADEA") against Carnine and Vore should be dismissed because these causes of action do not provide for individual liability. Because the court has concluded that Carnine has not yet been properly served, the court lacks jurisdiction to rule on the defendants' motion as to Carnine. *See Dodco, Inc. v. American Bonding Co.*, 7 F.3d 1387, 1388 (8th Cir. 1993) ("If a defendant is improperly served, the court lacks jurisdiction over the defendant.") (citing *Cohen v. Newsweek, Inc.*, 312 F.2d 76, 77-78 (8th Cir. 1963)). The court's ruling on this 12(b)(6) motion, therefore, relates solely to defendant Vore.

Federal Rule of Civil Procedure 12(b)(6) authorizes the district courts to dismiss any complaint which fails "to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). Rule 12(b)(6) affords a defendant an opportunity to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true. Under this standard, a complaint should be dismissed only where it appears that the plaintiff can prove no set of facts in support of her claim which would entitle her to relief. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Knapp v. Hanson*, 183 F.3d 786, 788 (8th Cir. 1999) ("A motion to dismiss should be granted only if 'it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief.'") (quoting *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986), and citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). In applying this standard, the court must presume all factual allegations in the complaint as true and draw all reasonable inferences in favor of the non-moving party. *E.g., Whitmore v. Harrington*, 204 F.3d 784, 784 (8th Cir. 2000); *accord Cruz v. Beto*, 405

U.S. 319, 322 (1972); *Anderson v. Franklin County, Mo.*, 192 F.3d 1125, 1131 (8th Cir. 1999); *Gross v. Weber*, 186 F.3d 1089, 1090 (8th Cir. 1999); *Midwestern Mach., Inc. v. Northwest Airlines, Inc.*, 167 F.3d 439, 441 (8th Cir. 1999); *Valiant-Bey v. Morris*, 829 F.2d 1441, 1443 (8th Cir. 1987). The court need not, however, accord the presumption of truthfulness to any legal conclusions, opinions or deductions, even if they are couched as factual allegations. *Silver v. H & R Block, Inc.*, 105 F.3d 394, 397 (8th Cir. 1997) (citing *In re Syntex Corp. Securities Lit.*, 95 F.3d 922, 926 (9th Cir. 1996)); *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990) (the court "do[es] not, however, blindly accept the legal conclusions drawn by the pleader from the facts," citing *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987), and 5 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1357, at 595-97 (1969)); *see also LRL Props. v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1103 (6th Cir. 1995) (the court "need not accept as true legal conclusions or unwarranted factual inferences," quoting *Morgan*, 829 F.2d at 12). Accordingly, to determine whether a complaint should be dismissed for failure to state a claim under Rule 12(b)(6), this court must examine the applicable substantive law and the facts alleged in the plaintiff's complaint.

Upon review of the submissions and the applicable authorities, this court has concluded that dismissal of Counts 1 and 3 of Wortham's complaint against Vore in his individual capacity, pursuant to Rule 12(b)(6), is warranted because that complaint fails to state any cognizable claims against him. Because a ruling on a 12(b)(6) motion is a ruling on the law, the court rejects Wortham's contention that this 12(b)(6) motion should be denied because it is premature to consider whether Vore can be held individually liable under Title VII or the ADEA until discovery is allowed to proceed.

Vore is not a proper defendant to Wortham's Title VII action because supervising employees may not be held individually liable under Title VII. *See Bales v. Wal-Mart Stores, Inc.*, 143 F.3d 1103, 1111 (8th Cir. 1998) (stating that district court properly

dismissed supervisor as a defendant in Title VII action because supervising employees cannot be held individually liable under that statute) (citing *Bonomolo-Hagen v. Clay Central-Everly Cmty. Sch. Dist.*, 121 F.3d 446, 447 (8th Cir. 1997) (per curiam)); *Spencer v. Ripley County State Bank*, 123 F.3d 690, 691-92 (8th Cir. 1997) (per curiam) (affirming district court's conclusion that individual employees are not personally liable under Title VII); *Haynes v. Williams*, 88 F.3d 898, 901 (10th Cir. 1996) ("[S]tatutory liability [under Title VII] is appropriately borne by employers, not individual supervisors."); *Gary v. Long*, 59 F.3d 1391, 1399 (D.C. Cir.) ("[W]hile a supervisory employee may be joined as a party defendant in a Title VII action, that employee must be viewed as being sued in his capacity as the agent of the employer, who is alone liable for a violation of Title VII.") (emphasis added), *cert. denied*, 516 U.S. 1011 (1995); *Lenhardt v. Basic Inst. of Tech., Inc.*, 55 F.3d 377, 381 (8th Cir. 1995) (observing that "the more recent cases reflect a clear consensus on the issue before us: supervisors and other employees cannot be held liable under Title VII in their individual capacities").

While the Eighth Circuit has not explicitly decided the issue, relevant caselaw strongly suggests that it would conclude that there is no individual liability under the ADEA. The liability schemes under Title VII and the ADEA are essentially the same in aspects relevant to this issue; they limit liability to the employer and use the term "agent" in defining employer. *See* 42 U.S.C. § 2000e-5(g) (Title VII); 29 U.S.C. § 626(b) (1988) (ADEA) (allowing actions against an employer by incorporating the procedures under 29 U.S.C. § 216(b)). Because Title VII and the ADEA define "employer" the same way, a logical extension of the Eighth Circuit's holding that there is no individual liability under Title VII, *Spencer*, 123 F.3d at 691- 92, is that there likewise is no individual liability under the ADEA. *See E.E.O.C. v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1279-80 (7th Cir. 1995); *accord Smith v. Lomax*, 45 F.3d 402, 403 n. 4 (11th Cir. 1995) (no individual liability under the ADEA); *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993) (no

individual liability under Title VII or ADEA) (citing *Padway v. Palches*, 665 F.2d 965, 968 (9th Cir. 1982)); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313-17 (2d Cir. 1995) (no individual liability under Title VII); *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1077 (3d Cir. 1996) (no individual liability under Title VII); *Birbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510, 511 (4th Cir.) (no individual liability under ADEA), *cert denied*, 513 U.S. 1058 (1994); *Stults v. Conoco*, 76 F.3d 651, 655 (5th Cir. 1996) (no individual liability under ADEA); *Williams v. Banning*, 72 F.3d 552, 554-55 (7th Cir. 1995) (no individual liability under Title VII); *E.E.O.C. v. AIC Sec. Investigations*, 55 F.3d 1276, 1279-82 (7th Cir. 1995) (no individual liability under the ADA); *Greenlaw v. Garrett*, 59 F.3d 994, 1001 (9th Cir. 1995) (no individual liability under Title VII); *Miller v. Maxwell's Int'l*, 991 F.2d 583, 587 (9th Cir. 1993) (no individual liability under Title VII or ADEA); *Haynes v. Williams*, 88 F.3d 898, 901 (10th Cir. 1996) (no individual liability under Title VII); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993) (no individual liability under Title VII). Therefore, the court grants the defendants' 12(b)(6) motion as to defendant Vore.

III. CONCLUSION

Having considered the issues presented on this motion to dismiss brought pursuant to 12(b)(4), 12(b)(5), and 12(b)(6), the court **grants in part and denies in part** the defendants' motion. More specifically,

1. The court **denies without prejudice** the defendants' contention that this case should be dismissed on the ground that they were not served within the prescribed 120 day period under Rule 4(m), because Judge Jarvey granted an extension and defendants were served within the extended time period.
2. The court **denies** the defendants' assertion that Carnine should be dismissed because the summons he was served was not "directed to" him. Recognizing this technical deficiency, the court grants the plaintiff leave to amend and correct the summons;

plaintiff shall have to and including September 30, 2002 in which to properly serve defendant Carnine.

3. The court **grants** the defendants' Rule 12(b)(6) motion **as to defendant Vore** and dismisses Counts 1 and 3 against him, having concluded he cannot be held individually liable under Title VII or the ADEA.

4. In addition, because the court lacks jurisdiction over defendant Carnine because he has not been properly served, the court establishes the following deadline: **Defendant Carnine shall have to and including October 7, 2002** in which to **renew his 12(b)(6) motion**, and he may revive this motion simply by notifying this court of his intention to do so.

IT IS SO ORDERED.

DATED this 17th day of September, 2002.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA